

APPEAL NO. 021893  
FILED SEPTEMBER 12, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 16, 2002. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease; that the respondent (carrier) did not waive its right to contest compensability under Section 409.021; and that the claimant did not have disability because he did not sustain a compensable injury. In his appeal, the claimant asserts error in each of those determinations. In its response to the claimant's appeal, the carrier argues that the appeal is untimely. Alternatively, the carrier urges affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

Initially, we consider the carrier's assertion that the claimant's appeal is untimely. We find no merit in the assertion. The carrier's contention is based upon its belief of when the claimant's attorney received the hearing officer's decision and order. It is well-settled that it is the date the party receives the hearing officer's decision and not the date its representative receives the decision that triggers the 15-day appeal period. There is no evidence of when the claimant received the hearing officer's decision. Thus, in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), the claimant is deemed to have received the hearing officer's decision five days after it was mailed, or on June 29, 2002, in this case. Section 410.202 was amended effective June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal period. Based on the June 29, 2002, date of receipt, the 15-day deadline for mailing the appeal was Monday, July 22, 2002. The claimant's appeal is post-marked July 22, 2002, and was received July 25, 2002. As such, it was timely filed.

The hearing officer did not err in determining that the claimant did not sustain his burden of proving the causal connection between his employment as a welder and his metastatic lung cancer. There was conflicting evidence on the issue of causation. The claimant's treating doctors opined that there was a causal connection between his work and the lung cancer, while the doctors who reviewed medical records on behalf of the carrier opined that there was not a causal connection between the claimant's work and his lung cancer. Under Section 410.165(a), the hearing officer is the sole judge of the weight and credibility of the evidence. As the fact finder, the hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. The hearing officer was acting within his province as the fact finder in determining that the claimant did not establish the causal connection between his employment and the lung cancer. Nothing in our review of the record reveals that the hearing officer's determination in that regard is so against the great weight of the

evidence as to be clearly wrong or manifestly unjust. Thus, no sound basis exists for us to disturb that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The affirmance of the hearing officer's determination that the claimant did not prove the causal connection between his employment and his cancer does not end the inquiry of whether the claimant sustained a compensable injury because a carrier waiver issue was also before the hearing officer. The carrier did not appeal the hearing officer's determination that it received written notice of the claimed injury on March 2, 2001, and that it filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) with the Texas Workers' Compensation Commission (Commission) contesting compensability on April 27, 2001. The claimant argues that the hearing officer erred in not applying the Texas Supreme Court's decision in Downs v. Continental Cas. Co., No. 00-1309, decided June 6, 2002. At the time of the hearing, the Commission had determined that the holding in Downs would not be followed until the rehearing process was exhausted. TWCC Advisory No. 2002-08 (June 17, 2002). On August 30, 2002, the Texas Supreme Court denied the carrier's motion for rehearing, and, as such, the Downs decision, along with the requirement to adhere to the seven-day "pay or dispute" provision, is final. Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002. As noted above, the carrier did not comply with the seven-day pay or dispute provision in this case in that it received written notice of the alleged injury on March 2, 2001, and did not file the TWCC-21 disputing the injury until April 27, 2001. Accordingly, we reverse the hearing officer's determination that the carrier did not waive the right to contest compensability and render a new decision that the carrier did waive its right to contest compensability herein. Thus, we likewise reverse the determination that the claimant did not sustain a compensable occupational disease injury, metastatic cancer, and render a new decision that the claimant sustained a compensable injury, as a matter of law pursuant to Section 409.021.

The hearing officer made an unchallenged factual finding that the claimant was unable to obtain and retain employment at his preinjury wage due to his cancer from \_\_\_\_\_, through the date of the hearing. However, he determined that the claimant did not have disability based upon the determination that the claimant did not sustain a compensable injury. Given that we have reversed the hearing officer's injury determination and rendered a new decision that the claimant sustained a compensable injury as a matter of law under Section 409.021, we also reverse the determination that the claimant did not have disability and render a new determination that the claimant had disability from \_\_\_\_\_, through the date of the hearing.

The hearing officer's determination that the claimant did not prove a causal connection between his employment and his cancer is affirmed. However, the determination that the claimant did not sustain a compensable injury is reversed and a new decision rendered that the claimant sustained a compensable injury, as a matter of law, because the carrier waived its right to contest compensability pursuant to Downs. The determination that the claimant did not have disability is also reversed and a new

decision rendered that the claimant had disability from \_\_\_\_\_, through the date of the hearing.

The true corporate name of the insurance carrier is **HIGHLANDS UNDERWRITERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**JAMES HOOKER  
10370 RICHMOND AVENUE, SUITE 1300  
HOUSTON, TEXAS 77042.**

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Elaine M. Chaney  
Appeals Judge

CONCUR:

\_\_\_\_\_  
Robert W. Potts  
Appeals Judge

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Margaret L. Turner  
Appeals Judge